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U Television Sdn Bhd & Anor v Comintel Sdn Bhd

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-12–03 OF 2016(W)
RAUS SHARIF CHIEF JUSTICE, ZULKEFLI PCA, HASAN LAH, AZIAH ALI AND JEFFREY TAN FCJJ
18 AUGUST 2017

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Evidence — Expert evidence — Need for — Whether technical nature of case before trial court required expert evidence for determination of dispute between parties — Whether plaintiff failed to discharge burden of proving its case by failing to adduce expert — Whether trial court wrongly held plaintiff proven its claim after regarding two of its witnesses as experts and rejecting defendants' witnesses as non-experts — Whether plaintiff's witnesses were merely witnesses of fact and were not independent and did not qualify as experts under s 45 of the Evidence Act 1950 — Whether evidence before trial court showed plaintiff failed to perform its obligations under contract and there had been total failure of consideration on its part — Whether plaintiff's act of terminating contract act of repudiation — Whether defendants' counterclaim for refund of all monies it paid to plaintiff under contract allowed to put parties back to their original positions — Evidence Act 1950 ss 101 & 102 — Contracts Act 1950 s 40

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The first appellant ('U-TV') was a licensed television broadcaster while the respondent was a provider of software and hardware solutions for the broadcast and telecommunication industries. Pursuant to a letter of award ('LOA'), U-TV engaged the respondent to provide a solution to the various technical problems it faced in its broadcast transmissions. Payment for the work done by the respondent was guaranteed by the second appellant. Pursuant to the LOA, the respondent was to pass a 'Proof of Concept Site Acceptance Test' ('POC SAT') to determine whether its proposed solutions resolved U-TV's technical problems. The parties initially agreed that the test protocol that would be used would be the POC SAT version 3.8(a). Testing using the version 3.8(a) was, however, aborted mid-way when U-TV felt that that version was unsuitable and wanted changes to be made to the test protocol. The changes resulted in a reformatted version 3.8(b) which, during its initial testing, failed to solve U-TV's problems. The respondent refused to accept the test results on the ground version 3.8(b) was not a mutually-agreed-upon test protocol that was to be used. A re-test was considered but it never took place as the parties could not agree on the scope of the revised POC SAT. On the evidence, the test based on version 3.8(a) was never fully performed. The respondent took the view that versions 3.8(a) and 3.8(b) were substantially different from each other but the appellants contended that they were similar. The respondent terminated the

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LOA claiming that U-TV had repudiated the contract by failing to make payments when due and for preventing or interfering with the respondent's work in carrying out the contract. The respondent made a call on the guarantee and thereafter sued the appellants for damages for breach of contract. U-TV counterclaimed for the refund of all monies it had paid the respondent under the LOA in addition to damages for breach of contract. The High Court allowed the respondent's claim and dismissed the counterclaim holding, inter alia, that the respondent had passed the POC SAT test. The court found that the versions 3.8(a) and 3.8(b) were different and decided the case based largely on the evidence of two of the respondent's witnesses, PW2 and PW3, whom it regarded had the expertise and know-how concerning the technical aspects of the case as opposed to the appellants' witnesses whom the court felt lacked such expertise. The Court of Appeal ('the COA') dismissed the appellants' appeal and affirmed the High Court's decision ruling, inter alia, that the crucial issue in the case was whether the correct test protocol had been used. The appellants were given leave to appeal to the Federal Court against the COA's decision on the question whether in a case where the plaintiff had the burden of establishing facts which by their nature required expert evidence to establish them, it was open to the court to rule that the plaintiff had discharged its burden without calling for expert evidence. At the appeal, the appellants contended that although the issues before the trial court were of a technical nature — such as whether the POC SAT had been achieved — the court had decided the matter without the benefit of expert evidence from either party. The appellant contended, inter alia, that as the respondent never passed the POC SAT, it had breached the contract. The respondent, on the other hand, argued that expert evidence was not relevant or necessary in the case as the dispute between the parties centred on whether a mutually-agreed-upon test protocol version had been used. The respondent contended that the courts below found that the appellants had refused to use the test version designed by the respondent and thus effectively prevented/hindered it from carrying out its obligations under the contract.

Held, allowing the appeal, answering the leave question in the negative, setting aside the decisions of the courts below and allowing the appellants' counterclaim for return of the RM20,833,053 they had paid to the respondent under the contract:

(1) There being no expert evidence, the High Court was in no position to make a determination on the technical issues in the case. In the context of the present case, expert evidence was required. Since the courts below determined that there was a need for technical evidence for the parties to prove their respective cases, the pertinent question was whether the approach of the courts below was correct with regard to the discharge by the respondent of its burden of proof in seeking judgment in respect of a matter of a technical nature. When it was determined that there was a

need for technical evidence, it was incumbent upon the respondent to have led evidence through experts. It did not do so and because of that, the respondent failed to discharge its burden of proof under ss 101 and 102 of the Evidence Act 1950. Consequently, the onus of proof did not shift to the appellants to dislodge the assertions made by the respondent as the claimant (see paras 34, 45 & 50).

(2) The trial court decided that the respondent had proven its case based on the evidence of its witnesses, PW2 and PW3. Their evidence was preferred on the basis they had demonstrated technical expertise and knowledge of the working of the project. The High Court accepted the two witnesses as experts although they did not satisfy the test under s 45 of the Evidence Act 1950 ('the EA'). For a witness to be an expert, he had to be truly independent and skilled in the area in which he was giving evidence. PW3 was the respondent's CEO while PW2 was the respondent's senior manager who was personally involved in the technical aspects of the project and who coordinated and oversaw the implementation of the project and participated in discussions with the first appellant to finalise the test protocol for the POC SAT. Both PW2 and PW3 fell far short of the required standard of an expert witness under s 45 of the EA. They were witnesses of fact and could not be characterised as experts. They were hardly independent. As members of the respondent's senior management team, they should have been treated as having an interest in the case, and that fact itself should have disqualified them as truly independent witnesses (see paras 39–41, 43 & 45).

(3) The High Court rejected and disbelieved the testimonies of the appellants' witnesses, DW1 and DW2 — that the definitive version was version 3.8(b) — particularly because they were not technical experts for the POC SAT but were accountants by profession. It was not a question of accepting the testimonies of PW2 and PW3 and disbelieving DW1 and DW2 on the issues raised. The parties differed in their interpretation of the POC SAT. The appellants understood it to be a model of the end-to-end broadcast solution. The respondent viewed it as a stand-alone system. The parties also disagreed on whether versions 3.8(a) and 3.8(b) were the same. The issues surrounding POC SAT were technical in nature and were pivotal in determining whether the first appellant had wrongfully prevented the respondent from performing its obligations under the LOA as contended (see paras 37–38, 42 & 45).

(4) There was a total failure of consideration on the part of the respondent to perform its obligations under the contract. The first appellant did not receive what it had contracted for. The turnkey contract required the respondent to remove the technical faults faced by the first appellant. On the evidence before the court, the POC SAT based on version 3.8(a) was

at no time performed and achieved, yet the trial court came to the erroneous finding that the respondent had passed the POC SAT (see paras 52 & 54).

(5) On the facts and circumstances of the case, the respondent's failure to rectify the failed POC SAT was a breach of its obligations as a full turnkey contractor under the terms of the LOA and of the representations it made of its skills and expertise. The failure of the POC SAT effectively prevented the project from moving forward as the delivery of transmission sites and the testing and acceptance of the redesigned Network Operation Centre were contingent on the respondent having passed the POC SAT. In this regard, the respondent could not contend that the first appellant had wrongly prevented it from performing the LOA. The respondent's act of terminating the contract itself amounted to a repudiation under s 40 of the Contracts Act 1950 (see paras 53–54).

(6) The appellants' counterclaim to the extent of the recovery of the RM20,833,053 they had paid to the respondent under the contract was allowed so as to put the parties back to their original positions (see para 56).

[Bahasa Malaysia summary

Perayu pertama ('U-TV') adalah penyiar televisyen berlesen sementara responden adalah pembekal penyelesaian persisian dan perkakasan untuk industri penyiaran dan telekomunikasi. Berikutan surat award ('LOA'), U-TV mengupah responden untuk membekalkan penyelesaian kepada beberapa masalah teknikal yang dihadapinya dalam transmisi siarannya. Bayaran untuk kerja yang dibuat oleh responden dijamin oleh perayu kedua. Berikutan LOA tersebut, responden mestilah lulus 'Proof of Concept Site Acceptance Test' ('POC SAT') untuk menentukan sama ada penyelesaian yang dicadangkan tersebut dapat menyelesaikan masalah teknikal U-TV's. Pihak-pihak pada mulanya bersetuju bahawa protokol ujian yang akan digunakan adalah POC SAT versi 3.8(a). Menguji dengan menggunakan versi 3.8(a) adalah, walau bagaimanapun, berhenti separuh jalan apabila U-TV berasa bahawa versi tersebut tidak sesuai dan mahu perubahan dibuat kepada protokol ujian. Perubahan menyebabkan versi 3.8(b) diformatkan semula yang mana, semasa ujian permulaannya, gagal untuk menyelesaikan masalah U-TV. Responden enggan menerima keputusan ujian atas alasan versi 3.8(b) tidak dipersetujui secara bersama atas protokol ujian yang digunakan. Ujian semula dipertimbangkan tetapi ia tidak pernah berlaku kerana pihak-pihak tidak dapat bersetuju atas skop POC SAT yang disemak semula. Atas keterangan, ujian yang didasarkan ke atas versi 3.8(a) tidak pernah secara keseluruhannya dilakukan. Responden berpandangan bahawa versi 3.8(a) dan 3.8(b) adalah berbeza secara substansial daripada satu sama lain tetapi perayu-perayu berhujah bahawa ia adalah sama. Responden menamatkan LOA tersebut dengan mendakwa bahawa U-TV telah membatalkan kontrak kerana gagal

untuk membuat bayaran apabila kena dibayar dan untuk menghalang atau campur tangan dengan kerja-kerja responden dalam menjalankan kontrak tersebut. Responden membuat panggilan ke atas jaminan dan kemudiannya menyaman perayu-perayu bagi ganti rugi untuk kemungkiran kontrak. U-TV menuntut balas untuk mendapatkan kembali kesemua wang yang telah dibayar kepada responden di bawah LOA tersebut dalam tambahan kepada ganti rugi untuk kemungkiran kontrak. Mahkamah Tinggi membenarkan tuntutan responden dan menolak tuntutan balas tersebut dengan memutuskan, antara lain, bahawa responden telah lulus ujian POC SAT tersebut. Mahkamah mendapati bahawa versi 3.8(a) dan 3.8(b) adalah berbeza dan memutuskan kes berdasarkan sebahagian besarnya ke atas keterangan saksi-saksi responden, PW2 dan PW3, yang ia menganggap mempunyai kepakaran dan pengetahuan mengenai aspek teknikal kes berbanding degan saksi-saksi perayu-perayu yang mana mahkamah rasa kekurangan kepakaran tersebut. Mahkamah Rayuan ('MR') menolak rayuan perayu-perayu dan mengesahkan keputusan Mahkamah Tinggi dengan memutuskan, antara lain, bahawa isu penting dalam kes adalah sama ada protokol ujian betul telah digunakan. Perayu-perayu diberikan izin untuk merayu kepada Mahkamah Persekutuan terhadap keputusan MR atas soalan sama ada jika plaintif mempunyai beban untuk membuktikan fakta yang mana melalui sifat mereka memerlukan keterangan pakar untuk membuktikannnya, ia adalah terbuka kepada mahkamah untuk memerintahkan bahawa plaintif telah melepaskan bebannya tanpa memanggil keterangan pakar. Semasa rayuan, perayu-perayu berhujah bahawa walaupun isu-isu di hadapan mahkamah perbicaraan adalah bersifat teknikal — seperti sama ada POC SAT telah dicapai — mahkamah telah memutuskan perkara tanpa faedah keterangan pakar daripada kedua-dua pihak. Perayu berhujah, antara lain, bahawa memandangkan responden tidak pernah lulus POC SAT tersebut, ia telah memungkiri kontrak tersebut. Responden, sebaliknya, berhujah bahawa keterangan pakar adalah tidak relevan atau perlu dalam kes kerana pertikaian di antara pihak-pihak berpusat ke atas sama ada versi protokol ujian yang dipersetujui bersama telah digunakan. Responden berhujah bahawa mahkamah-mahkamah bawahan mendapati bahawa perayu-perayu telah enggan untuk menggunakan versi ujian yang direka oleh responden dan oleh itu dengan efektif menghalangnya daripada menjalankan tanggungjawabnya di bawah kontrak tersebut.

Diputuskan, membenarkan rayuan, menjawab soalan izin dalam negatif, mengenepikan keputusan mahkamah-mahkamah bawahan dan membenarkan tuntutan balas perayu-perayu untuk pengembalian semula RM20,833,053 yang mereka bayar kepada responden di bawah kontrak:

(1) Memandangkan tidak terdapat keterangan, Mahkamah Tinggi tidak dalam keadaan untuk membuat penentuan atas isu-isu teknikal dalam kes. Dalam konteks kes ini, keterangan pakar diperlukan. Memandangkan mahkamah-mahkamah bawahan menentukan bahawa

terdapat keperluan untuk keterangan teknikal bagi pihak-pihak untuk membuktikan kes-kes mereka masing-masing, soalan berkaitan adalah sama ada pendekatan mahkamah-mahkamah bawahan adalah betul berkaitan pelepasan oleh responden ke atas beban pembuktiannya dalam memohon penghakiman berkaitan perkara bersifat teknikal. Apabila ditentukan bahawa terdapat keperluan untuk keterangan teknikal, ia adalah wajib ke atas responden untuk mengemukakan keterangan melalui pakar. Ia tidak berbuat demikian dan oleh sebab itu, responden gagal untuk melepaskan beban pembuktiannya di bawah ss 101 dan 102 Akta Keterangan 1950. Akibatnya, beban pembuktian tidak beralih kepada perayu-perayu untuk melepaskan pernyataan yang dibuat oleh responden sebagai penuntut (lihat perenggan 34, 45 & 50).

(2) Mahkamah perbicaraan memutuskan bahawa responden telah membuktikan kesnya berdasarkan keterangan saksi-saksinya, PW2 dan PW3. Keterangan mereka lebih disukai atas dasar mereka telah menunjukkan kepakaran teknikal dan pengetahuan tentang perjalanan projek tersebut. Mahkamah Tinggi menerima kedua-dua saksi-saksi sebagai pakar walaupun mereka tidak memenuhi ujian di bawah s 45 Akta Keterangan 1950 ('AK'). Untuk saksi menjadi pakar, dia perlu benar-benar bebas dan mahir dalam bidang yang mana dia memberi keterangan. PW3 adalah CEO responden sementara PW2 adalah pengurus kanan responden yang secara peribadi terlibat di dalam aspek teknikal projek tersebut dan yang menyelaraskan dan mengawasi pelaksanaan projek dan turut serta dalam perbincangan dengan perayu pertama untuk menyiapkan protokol ujian bagi POC SAT tersebut. Kedua-dua PW2 dan PW3 tidak mempunyai standard yang diperlukan bagi saksi pakar di bawah s 45 AK. Mereka adalah saksi-saksi fakta dan tidak dapat dicirikan sebagai pakar. Mereka bukan bebas. Sebagai ahli kumpulan pengurusan kanan responden, mereka patut dianggap sebagai mempunyai kepentingan dalam kes, dan fakta itu sepatutnya tidak melayakkan mereka sebagai saksi-saksi bebas yang sebenarnya (lihat perenggan 39–41, 43 & 45).

(3) Mahkamah Tinggi menolak dan tidak percaya keterangan saksi-saksi perayu-perayu, DW1 dan DW2 — bahawa versi definitif adalah versi 3.8(b) — terutamanya kerana mereka bukan pakar teknikal untuk POC SAT tersebut tetapi adalah akauntan mengikut profesyen. Ia bukan soalan tidak menerima keterangan PW2 dan PW3 dan tidak mempercayai DW1 dan DW2 atas isu-isu yang dibangkitkan. Pihak-pihak berbeza dalam tafsiran POC SAT tersebut. Perayu-perayu faham yang ianya adalah model penyelesaian penyiaran hujung dengan hujung. Responden menganggapnya sebagai sistem berdiri sendiri. Pihak-pihak juga tidak bersetuju atas sama ada versi 3.8(a) dan 3.8(b) adalah sama. Isu-isu sekeliling POC SAT adalah bersifat teknikal dan adalah penting dalam menentukan sama ada perayu pertama telah secara

salah menghalang responden daripada melakukan tanggungjawabnya di bawah LOA tersebut seperti yang dihujahkan (lihat perenggan 37–38, 42 & 45).

(4) Terdapat kegagalan sepenuhnya terhadap pertimbangan oleh pihak responden untuk melaksanakan tanggungjawabnya di bawah kontrak. Perayu pertama tidak menerima apa yang ia telah dikontrakkan. Kontrak *turnkey* tersebut memerlukan responden untuk menghapuskan kerosakan teknikal yang dihadapi oleh perayu pertama. Atas keterangan di hadapan mahkamah, POC SAT berdasarkan versi 3.8(a) tidak pada bila-bila masa berfungsi dan dicapai, tetapi mahkamah perbicaraan mencapai kepada dapatan salah bahawa responden telah lulus POC SAT tersebut (lihat perenggan 52 & 54).

(5) Atas fakta dan keadaan kes, kegagalan responden untuk memperbaiki POC SAT yang gagal tersebut adalah kemungkiran tanggungjawabnya sebagai kontraktor *turnkey* sepenuhnya di bawah terma-terma LOA dan terhadap representasi yang ia buat mengenai kemahiran dan kepakarannya. Kegagalan POC SAT secara efektif menghalang projek tersebut daripada bergerak kehadapan kerana penghantaran kawasan penyampaian dan pengujian dan penerimaan terhadap Network Operation Centre yang direka semula adalah kontinjen ke atas responden dengan lulus POC SAT tersebut. Dalam keadaan ini, responden tidak boleh berhujah bahawa perayu pertama telah secara salah menghalangnya daripada melaksanakan LOA tersebut. Tindakan responden menamatkan kontrak dengan sendiri merupakan penamatan di bawah s 40 Akta Kontrak 1950 (lihat perenggan 53–54).

(6) Tuntutan balas perayu-perayu setakat mendapatkan semula RM20,833,053 yang mereka telah bayar kepada responden di bawah kontrak adalah dibenarkan untuk meletakkan pihak-pihak kembali kepada kedudukan asal (lihat perenggan 56).]

Notes

For cases on need for expert evidence, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2014–2015.

Cases referred to

Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia Tenaga Nasional Bhd [2015] 5 MLJ 52, CA (refd)

Damansara Realty v Bangsar Hill Holdings Sdn Bhd & Others [2011] 6 MLJ 464, FC (refd)

Junaidi bin Abdullah v Public Prosecutor [1993] 3 MLJ 217, SC (refd)

Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697; [2017] 5 CLJ 418, FC (refd)

PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd [2009] 7 MLJ 681, HC (refd)
Ranchhodbhai Somabhai and Anr v Babubhai Bhailalbhai and Ors AIR 1982 Guj 308, HC (refd)
Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291, SC (refd)
Stocznia Gdanska SA v Latvian Shipping Co and others [1998] 1 All ER 883, HL (refd)
Syed Abu Bakar bin Ahmad v Public Prosecutor [1984] 2 MLJ 19, FC (refd)

Legislation referred to

Communications and Multimedia Act 1998
Contracts Act 1950 s 40
Evidence Act 1950 ss 45, 101, 102
Indian Evidence Act [IND] ss 101, 102

Gopal Sri Ram (Clinton Tan Kian Seng and David Yii with him) (Thomas Philip) for the appellants.
Cyrus Das (Nahendran Navaratnam, Wong Wye Wah and Tan Min Lee with him) (Gan Partnership) for the respondent.

Zulkefli PCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants against the decision of the Court of Appeal affirming the decision of the High Court allowing the claim of the respondent against the appellants for breach of contract and dismissing the counterclaim of the appellants against the respondent. The appellants were the first and second defendants and the respondent was the plaintiff before the High Court. We shall refer to the parties as they were before the High Court.

[2] The defendants were granted leave to appeal against the decision of the Court of Appeal on the following question of law:

> Where the onus is upon the plaintiff to establish facts which by their nature call for or demand expert evidence under s 45 of the Evidence Act 1950, is it open to the court to hold the said onus to have been discharged without the plaintiff calling any expert evidence having regard to the decision of the Federal Court in *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19?

BACKGROUND FACTS

[3] The relevant background facts of the case are as follows.

The plaintiff was a company involved in the business of amongst others providing software and hardware solutions in the broadcast and

telecommunication industries. The first defendant was granted a broadcasting licence under the Communications and Multimedia Act 1998 to provide digital broadcasting services as a subscription TV operator which broadcast local and overseas TV channels.

[4] The system set up by the first defendant experienced various problems in transmission to viewers. This included poor picture quality, picture jerking, freezing of frames and intermittent video and audio streams. The first defendant engaged the plaintiff to provide technical consultancy services to resolve technical problems that the first defendant encountered in digital broadcasting.

[5] After discussions between the parties, a letter of award ('LOA') dated 5 December 2006 was issued by which the plaintiff undertook works in the re-design and transmission enhancement ('the project') for the first defendant on a full turnkey basis. The second defendant executed a guarantee and indemnity to pay on demand all monies due to the plaintiff under the LOA.

[6] The project consisted of three phases. The contract price for each phase were as follows:

Phase 1	RM33,394,265.59
Phase 2	RM36,288,215.22
Phase 3	RM45,360,269.02
Total contract price	RM115,042,749.83

[7] Both parties later agreed to remove a certain portion from the scope of work in the LOA. This resulted in a reduction of the contract price for phase 1 to RM32,050,850.95. No formal agreement was executed between the plaintiff and the first defendant. The parties at all material times accepted the LOA to be the governing contract between them.

[8] Under the terms of the LOA the plaintiff was to pass a 'Proof of Concept Site Acceptance Test' ('POC SAT'). The POC SAT was a test aimed at determining whether the plaintiff's proposal solutions resolved the first defendant technical issues. Various drafts of the test protocol were negotiated between the parties. There were twelve draft versions of the POC SAT. This culminated in the POC SAT version 3.8(a).

[9] The POC SAT testing was initially scheduled to be tested on three days from 16 April 2008–18 April 2008. However, midway during the test on 16 April 2008 the first defendant contended that the plaintiff had not

A adequately planned and prepared the test. It failed to bring appropriate equipment to carry out the test. Further the first defendant observed that the test format of version 3.8(a) was not suited for the intended purpose of the POC SAT as it would not allow proper recording of the test presentation and results.

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[10] The first defendant then deferred the test to the next day when the first defendant alleged that the plaintiff's representatives were told that although version 3.8(a) would be used, that format changes would have to be made in order to improve the presentation and procedure of the test format to enable C proper tracking of the test and its results.

[11] The defendants contended that the plaintiff was aware of the changes and agreed to apply the changes to the the POC SAT. Consequently the POC SAT was carried on 17 April 2008, 18 April 2008 and 21 April 2008 using D reformatted version 3.8(a) which came to be described as version 3.8(b). It was the defendants' position that versions 3.8(a) and 3.8(b) of the POC SAT were similar in substance. The plaintiff however contended otherwise.

E **[12]** The first defendant had made payment to the plaintiff amounting to RM20,833,053 for the period between 12 December 2006 and 19 March 2008 under the said project.

[13] The plaintiff claimed that by reason of the first defendant's failure to F make payment when due and by its acts and/or omissions in preventing and/or interference with the plaintiff's performance and its obligation under the LOA, the first defendant had breached and repudiated the LOA. The plaintiff had no alternative but to terminate the LOA.

G **[14]** Pursuant to the guarantee and indemnity executed by the second defendant, the plaintiff demanded the amount due to the plaintiff from the first defendant.

[15] The plaintiff in its statement of claim sought the following reliefs:

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(a) general damages for breach of contract in the sum of RM21,278,498.10 comprising:

(i) amount due and owing for work done by the plaintiff in the sum of RM11,217,797.84.

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(ii) amount due and owing to the plaintiff pursuant to cll 15C(1) and 15C(II) of the LOA in the sum of RM10,160,700.26;

alternatively, damages for breach of contract in a sum to be assessed,

by the first and second defendants and/or each of them in such proportion (if any) as may be determined by the court;

(b) special damages for storage and insurance costs of the transmitters in the sum of RM162,517.10 as of 23 June 2010 and still continuing;

(c) costs;

(d) interest on such amounts of special and/or general damages as may be awarded by this court; and

(e) such further and other relief as deems fit.

[16] The first defendant's counterclaim against the plaintiff sought the following reliefs:

(a) the sum of RM20,833,053 to be paid by the plaintiff to the first defendant within fourteen days of the date of the court's order;

(b) general damages for breach of contract to be assessed by the court;

(c) interest at the rate of 8%pa on all sums adjudged to be paid by the plaintiff to the first defendant;

(d) costs on a solicitor and client basis; and

(e) further and other relief as the court deems proper.

FINDINGS OF THE HIGH COURT

[17] The main issues for determination before the High Court as found by the learned High Court judge are as follows:

(a) whether the POC SAT versions 3.8(a) and 3.8(b) were the same or were they different; and

(b) whether the plaintiff had passed the POC SAT either based on versions 3.8(a) or 3.8(b).

[18] The learned High Court judge came to a finding that the plaintiff had passed the POC SAT and hence allowed the plaintiff's claim and dismissed the defendants' counterclaim for the following reasons, amongst others:

(a) the defendants' witnesses lacked expertise and technical knowhow despite holding senior management positions in the first defendant and being involved in the project (see para 57 of the judgment of the High Court);

(b) the plaintiffs' witnesses PW2 and PW3 demonstrated that they had the technical expertise and know how of the working of the project (see para 58 of the judgment of the High Court);

(c) the plaintiff's evidence that the POC was a standalone system was to be preferred over the defendants' contention that the POC was an end-to-end broadcast solution (see para 59 of the judgment of the High Court); and

(d) versions 3.8(a) and 3.8(b) are different (see para 61 of the judgment of the High Court).

FINDINGS OF THE COURT OF APPEAL

[19] The Court of Appeal affirmed the decision of the High Court and dismissed the defendants' appeal. The learned judges of the Court of Appeal in their judgment stated that the crucial issue raised in the case was, what was the correct test protocol to be used: version 3.8(a) or version 3.8(b) (see para 53 of the judgment of the Court of Appeal).

[20] The Court of Appeal took note of the learned High Court judge's finding that the plaintiff's witnesses, PW2 and PW3, demonstrated that they had the technical expertise and knowhow of the workings of the project. This led the Court of Appeal to affirm the decision of the High Court and to hold that the test protocol version 3.8(b) utilised was not mutually agreed to by the parties and that it was substantially different from version 3.8(a) and that thus the plaintiff was entitled to reject the test results of the test protocol of version 3.8(b).

SUBMISSIONS OF THE DEFENDANTS

[21] Learned counsel for the defendants submitted that the plaintiff was supposedly the expert who would solve the problems faced by the first defendant in its digital broadcasting. The main point in the case before the High Court was whether the plaintiff had solved the problem that it was engaged to remedy. What this meant was whether the POC SAT had been achieved.

[22] It was the contention of the defendants that the issues raised before the court were admittedly of a technical nature. Learned counsel for the defendants submitted that the learned High Court judge did not direct parties to lead expert evidence on the technical issues. Parties were left to determine the nature of their evidence thought sufficient to establish their respective cases. Consequently, no expert witness was called by either party at the trial.

[23] The defendants contended that the plaintiff's fact witnesses, PW2, PW3 and PW4, who claimed to have a technical background, amongst others, at the trial had made the following critical admissions in their evidence on essential points which wholly undermined the plaintiff's case as follows:

(a) the test criteria and components of POC SAT version 3.8(a) and 3.8(b) were the same. The diagrams drawn to illustrate versions 3.8(a) and 3.8(b) were also the same;

(b) the plaintiff was aware and accepted that whether the system had 'frozen' during the POC SAT was not the only criteria for the plaintiff to pass;

(c) the plaintiff recognised the first defendant's desire to test the system functionality and performance from end-to-end;

(d) the POC SAT conducted in April 2008 was not a trial run; and

(e) there were no documents to show that the plaintiff had in fact passed version 3.8(a).

[24] The first defendant also contended that the test results recorded failure of the plaintiff's solutions at various stages, resulting in the failed POC SAT. The plaintiff refused to accept the test results and attempted to declare the test result as void, alleging the tests to be merely a 'trial run'.

[25] Upon the plaintiff's request, parties considered a re-test but no re-test was conducted as parties could not agree on the scope of the revised POC SAT.

[26] It was the defendants' case that the plaintiff's failure to rectify the failed POC SAT was a breach of the plaintiff's obligations as a full turnkey contractor under the terms of the LOA and of the representations made by the plaintiff of its skills and expertise.

[27] It was the contention of the defendants that the plaintiff's breach resulted in the project being suspended and stalled, including the re-test of the POC SAT, Network Operation Centre Acceptance Tests ('NOC SAT') and installation of the transmitters.

SUBMISSIONS OF THE PLAINTIFF

[28] It was the submission of the plaintiff that the dispute between the parties was essentially a contractual dispute over the agreed test protocol version to be used for the tests conducted jointly between representatives from both sides. In this regard the learned High Court judge was not called upon to decide on technical questions or any mater involving scientific knowledge or know-how.

[29] It was the contention of the plaintiff, that there was concurrent finding of fact by the courts below that the first defendant deliberately failed to use the

A test version designed by the plaintiff and effectively prevented or hindered the plaintiff from completing the project.

[30] On the part of the plaintiff, its onus was to prove what was the test protocol agreed by the parties under cl 15B of the LOA and not the technical components of the same or how it worked. It was submitted that expert evidence was neither relevant nor necessary given what was agreed by the parties. If the first defendant thought otherwise it could have called an independent technical witness to prove the compatibility between versions 3.8(a) and 3.8(b).

[31] It was the contention of the plaintiff that in the circumstances of the case it did not see any necessity to call an expert witness on the issues in dispute.

DECISION

[32] It is to be noted at the outset that the learned judges of the High Court and the Court of Appeal took the view that the technical nature of the evidence presented by the parties required technical expertise.

[33] The main issue for determination in the case before the High Court was whether the POC SAT had been performed and the results achieved. The plaintiff contended it met the test. The defendants contended otherwise. Neither side called an expert to determine whether the test had been met. Nevertheless, the learned High Court judge treated the two important witnesses of the plaintiff (PW2 and PW3) as if they were experts.

[34] It is our considered view that the fact that since both the courts below determined that there was a need for technical evidence for parties to prove their respective case, the pertinent question to be resolved in this case is whether the approach adopted by both the High Court and the Court of Appeal was correct as regards the discharge of the burden of proof by the plaintiff seeking judgment in respect of matters of a technical nature.

[35] On the meaning and application of the term 'burden of proof' s 101 of the Evidence Act 1950 ('the Act') states that it is the burden to establish a case which rests throughout on the party who assert the affirmative of the issue. The 'burden of proof' in s 102 of the Act is the burden to adduce evidence, to make out or rebut the claim. The 'burden of proof' in s 102 of the Act shifts from one side to the other according to the weight of the evidence.

[36] In the Federal Court's case of *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho,*

deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697; [2017] 5 CLJ 418 His Lordship Jeffrey Tan FCJ cited with approval the principle laid down in the case of *Ranchhodbhai Somabhai and Anr v Babubhai Bhailalbhai and Ors* AIR 1982 Guj 308 as regards the 'burden of proof' to establish a case which never shift and the shifting burden to adduce evidence in the context of ss 101 and 102 of the Indian Evidence Act which are identical to ss 101 and 102 of our Act as follows:

> It is also well to bear in mind that there is an essential distinction between 'burden of proof' and 'onus of proof'; burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence (see *Raghavamma v Chenchamma* AIR 1964 SC 136). Burden of proof has two distinct meanings, namely, (i) the burden of proof as a matter of law and pleadings, and (ii) the burden of proof as a matter of adducing evidence. Section 101 of the Evidence Act deals with the former and s 102 of the Evidence Act with the latter. The first remains constant but the second shifts. In a claim application, therefore, the burden of proof, in the first sense, certainly lies on the claimant. If he examines himself and his witness, if any, and if the evidence, tested in the light of the principles set out above, is found to be acceptable, the onus shifts on the tortfeasor to prove those circumstances, if any, which dislodge the assertions of the claimants. If the tortfeasor fails to prove before the court any fact or circumstance which tends to affect the evidence led by the claimant, the claimant would be entitled to ask the court to hold that he has established the case and, on that basis, to make a just award it would thus appear, that though the legal burden — the burden as a matter of law and pleadings — remains constant on the claimant, the burden as a matter of adducing evidence changes often times as the trial of the claim petition progresses.

[37] In the present case the learned High Court judge recognised that the parties differed in their interpretation of the POC SAT. The defendants understood it to be a model of the end-to-end broadcast solution whereas the plaintiff viewed the POC SAT as a standalone system. The learned High Court judge further recognised that the parties differed on the issue of whether POC SAT versions 3.8(a) and 3.8(b) were the same.

[38] We are of the view the issues surrounding the POC SAT were technical in nature and were pivotal in determining whether the first defendant wrongfully prevented the plaintiff from performing the LOA as contended by the plaintiff.

[39] It is noted that the learned High Court judge decided on the burden of proof for the plaintiff to prove its case on this technical issue based on the evidence provided by its fact witnesses namely PW2 and PW3. The plaintiff's fact witnesses were preferred by the learned High Court judge on the basis that PW2 and PW3 demonstrated that they had the technical expertise and knowledge of the working of the project.

[40] The learned High Court judge accepted PW2 and PW3 as experts when in our view they did not satisfy the test under s 45 of the Act. Section 45 of the Act provides:

> 45(1) When the Court has to form an opinion upon a point of foreign law or of science or art or as to identify or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.
>
> (2) Such persons are called experts.

[41] For a witness to be an expert, he must be truly independent and skilled in the area in which he is giving evidence (see the case of *Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia Tenaga Nasional Bhd* [2015] 5 MLJ 52). In accepting the plaintiff's case the learned High Court judge relied in particular on the testimony of PW2, the plaintiff's senior manager who was personally involved in the technical aspects of the project and who coordinated and oversaw the implementation of the project and participated in the discussions to finalise the test protocol for the POC SAT with the first defendant. Reliance was also placed on the evidence of PW3, the CEO of the plaintiff's company.

[42] In contrast, the learned High Court judge rejected and disbelieved the testimony of the defendants' witnesses, DW1 and DW2, that the definitive version was version 3.8(b), particularly because DW1 and DW2 were not technical experts for the POC SAT, but were accountants by profession.

[43] It is our finding that both the plaintiff's witnesses, PW2 and PW3, fell far short of the required standard of an expert witness under s 45 of the Act. PW2 was the senior manager and PW3 the plaintiff's CEO and director. Both witnesses can hardly be described as independent. As members of the plaintiff's senior management team they should have been treated as having an interest in the case. This fact by itself should have disqualified them as truly independent witnesses.

[44] It is our considered view that the learned High Court judge, who formed the view that the issues required technical evidence, was in no position to make a determination of those technical issues without such expert evidence as the provision of s 45 of the Act applied.

[45] In the context of the present case we are of the view that expert evidence was required. The plaintiff's witnesses, namely PW2 and PW3 were witnesses of facts and could not be characterised as experts. It was not, but was found by the learned High Court judge, a question of accepting the testimony of plaintiff's witnesses PW2 and PW3 and disbelieving the testimony of the

defendants' witnesses, DW1 and DW2, on the issues raised. There being no expert evidence, the learned High Court judge was in no position to make a determination of these technical issues. On this point, we would like to refer to the observation made by Abdul Hamid FCJ (as he then was) in the case of *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19 at p 23 as follows:

> Our law is clear in that under s 45 of our Evidence Act 1950 it is provided that ... The scope of this section can be found in the commentary in *Sarkar on Evidence* (12th Ed) at p 488 where, while recognising that opinion in so far as it may be founded on legal evidence shall be the function of the tribunal whose province alone it is to draw conclusions of law or fact:
>
> > *There are however cases in which the court is not in a position to form a correct judgment without help of persons who have acquired special skill or experience on a particular subject, eg when the question involved is beyond the range of common experience or common knowledge or when special study of a subject or special training or special experience therein is necessary. In such cases the help of experts is required. In these cases, the rule is relaxed and expert evidence is admitted to enable the court to come to a proper decision.*
>
> ...
>
> Since the document was not examined by any person who has acquired a special skill or expert in the particular subject, ie handwriting, the question therefore is *was the learned High Court judge right in making the finding of fact that he did in the absence and without the aid of expert evidence?*
>
> ...
>
> *It is settled principle that while it is true that a judge who sits alone is entitled to weigh all the evidence, to put his own magnifying glass to determine the probabilities so to speak and form his own opinion or judgment, it would be erroneous for him to form a conclusion on a matter which could only be properly concluded with the aid for expert evidence.* (Emphasis added.)

[46] It is to be noted that the plaintiff did not lead their evidence on the basis upon which its witnesses were experts and as such their evidence were not scrutinised on that basis. On this point in *PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd* [2009] 7 MLJ 681 at p 702, Ramli Ali J (as he then was) held that:

> Opinions of experts are admissible to furnish the court with scientific information which is unlikely to be within the experience and knowledge of a judge (s 451(1) of the Evidence Act 1950).
>
> *Where expert testimony is required on certain matters including technical matters relevant in allegations of professional negligence (in this case, against a consulting engineer), it is not open to the court to decide on such matters in the absence of such evidence.* (Emphasis added.)

[47] The decision of Mohamed Azmi SCJ in *Junaidi bin Abdullah v Public*

Prosecutor [1993] 3 MLJ 217 is also relevant and instructive on the need to call expert evidence wherein His Lordship had this to say:

> *In our view, the test to be applied for the purpose of s 45 of the Evidence Act 1950 is this. First, does the nature of the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under enquiry?* The answer to both questions must necessarily depend on the facts of each particular case. The specialty of the skill required of an expert witness under s 45 would depend on the scientific nature and complexity of the evidence sought to be proved. *The more scientific and complex the subject matter, the more extensive and deeper will the court be required to enquire into the ascertainment of his qualification or experience in the particular field of art trade or profession.* (Emphasis added.)

[48] It was submitted for the plaintiff that if the first defendant held the view that expert evidence was relevant and necessary to prove the compatibility between versions 3.8(a) and 3.8(b) it was for the first defendant to call such independent technical witness. With respect we could not agree with such a contention.

[49] It must be borne in mind that the burden was on the plaintiff to put sufficient material before the High Court to discharge its burden of proof. It should also be noted that the defendants approached the matter on the basis that the admissions of the plaintiff's so-called technical witnesses on essential points had wholly undermined the plaintiff's own case, which can be seen as follows:

(a) the plaintiff's witness PW2, the senior manager of the plaintiff's system and Network Department in re-examination when asked whether the test criteria and components of POC SAT versions 3.8(a) and 3.8(b) were the same had this to say:

PC:	Why did you all come out with version 3.8(b)?
A:	We did not come out with 3.8(b). When we received the result it's actually the 3.8b result, yes. The test was carried out on 3.8(a). But, the result when come back is on 3.8(b).
PC:	Was the criteria used in 38(a), the same as been used in 3.8(b)?
A:	Yes. The content layer measurement, transcoding test is the same criteria stated.
PC:	The same criteria?
A:	Yes.

(See lines 11–24 at p 198 of the records of proceedings);

(b) the plaintiff was also aware and accepted that whether the system had 'frozen' during the POC SAT was not the only criteria for the plaintiff to pass. The plaintiff's witness PW4, one of the directors of the plaintiff in cross-examination on this point had this to say:

> DC: Another words, ... if you look at page 629 that is on the Content Acquisition test stage and you look at page 639, that is on the offline editing stage and finally you look at page 650 that is on the Compression and Delivery test stage. It does include a human perception element where the testing the parameters is to check whether there is video pixelization whether there is any video audio jerking and freezing, video noise, video crackle, audio rumble so on and so forth. So, therefore I said looking at all this, POC SAT is not just about whether STB freezes or otherwise, it is a little bit more than that?
>
> A: Yes, if you look at the main complaint by the operator is set topbox freeze. So the first thing is to solve this set topbox freeze and there is a recommendation to change WMV9 out and replace it with MPEG-4. Okay. The rest are basically a perception which is visual...for example pixelization and all that. We can carry out all kinds of test, and that would not be a problem.

(See lines 25-41 at p 276 of the record of proceedings);

(c) the plaintiff's witness PW2 admitted during cross-examination that the POC SAT test concluded in April 2008 was not a trial run:

> DC: Now, I understand from Goh that these 4 days ... right, 16th, 17th, 18th and 21st was actually a POC SAT and they are not the trial run.
>
> A: Yes, My Lady.

(See lines 4–8 at p 111 of the record of proceedings);

(d) PW3, the plaintiff's CEO and director in cross-examination could not show that the plaintiff had in fact passed version 3.8(a):

> DC: As far as you understand, you have already passed your portion. That's where I wanted to take it further and say, is there any documents to show that you have passed your portion. You, in the sense of Comintel have passed the Comintel's portion.
>
> A: By looking at the result form the test result given by the UTV, just on the original scope for the POC.
>
> DC: But, you don't have your own document to show that you have passed?
>
> A: I can't recall whether we have that.

(See lines 10–20 at p 241 of the record of proceedings); and

(e) the plaintiff's witness PW3 agreed that the onus was on the plaintiff as the vendor to document and prepare the test result.

> DC: Now, as a vendor, is it not in your interest to see that, you passed the POC SAT, is it also not in your interest to make recording of what was the results.
>
> A: Yes, it is our interest.
>
> (See lines 24–28 at p 237 of the record of proceedings).

[50] The High Court found that there was a need for technical evidence but, however, it preferred the evidence of the plaintiff on the basis of its so-called technical witnesses. It is our judgment, when it was determined that there was a need for technical evidence, it was incumbent on the plaintiff to lead evidence through experts. It did not do so and by reason of that failure had failed to discharge its 'burden of proof' under ss 101 and 102 of the Act. Consequently the 'onus of proof' did not shift to the defendants to dislodge the assertions made by the plaintiff as the claimant.

[51] Learned counsel for the defendants also raised an additional point in his submission. This was the question of whether the first defendant breached the terms under the LOA in not performing its obligations. It was the contention of the defendants that for a party to be held liable for breach of contract, he must be shown to have committed a breach going to the root of the contract (see *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291 at p 294). In the present case, the first defendant had shown its willingness to perform the contract. In the first place, it had paid 65% of the contract sum for phase 1. It wanted the glitches in the system to be removed. The plaintiff did not do that. Instead the plaintiff terminated the contract.

[52] It is to be noted in this case that the issue as to whether POC SAT had been achieved or not had not been determined in view of the conflicting contention of the parties. The plaintiff contended it met the test. The defendants refuted that. However, from the evidence adduced before the learned High Court judge, the test results recorded failure of the plaintiff's solutions at various stages, resulting in the failed POC SAT. The plaintiff refused to accept the test results on the ground that the first defendant adopted the POC SAT based on version 3.8(b) which the plaintiff claimed was not agreed upon by the parties. Upon the plaintiff's request, parties considered a re-test but no re-test was conducted as parties could not agree on the scope of the revised POC SAT. Therefore, on the evidence before the court, the POC SAT based on version 3.8(a) was at no time performed and achieved, but yet the learned High Court judge came to a finding that the plaintiff had passed the POC SAT. This to us was an erroneous finding.

[53] Based on the facts and the circumstances of the case it is our considered view that the plaintiff's failure to rectify the failed POC SAT was a breach of the plaintiff's obligations as a full turnkey contractor under the terms of the LOA and of the representations made by the plaintiff of its skills and expertise. The failure of the POC SAT effectively prevented the project from moving forward as the delivery of transmission sites and the testing and acceptance of the redesigned Network Operation Centre were contingent on the plaintiff having passed the POC SAT. In this regard, the plaintiff could not contend that the first defendant wrongly prevented it from performing the LOA.

[54] It can be said in this case that the first defendant did not receive what it contracted for. The turnkey contract required the plaintiff to remove the technical faults faced by the defendant in the system. Accordingly, we are of the view that there was a total failure of consideration on the part of the plaintiff to perform its obligations under the contract (see the cases of *Stocznia Gdanska SA v Latvian Shipping Co and others* [1998] 1 All ER 883 at p 896 and *Damansara Realty v Bangsar Hill Holdings Sdn Bhd & Others* [2011] 6 MLJ 464). The act of termination of the contract by the plaintiff itself amounted to a repudiation under s 40 of the Contracts Act 1950 which provides as follows:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put to an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[55] There was no judicial appreciation of the evidence by the learned High Court judge of the High Court in coming to the conclusion that the plaintiff had discharged its burden of proof of proving its case. The Court of Appeal also failed to exercise its powers of appellate intervention in not reversing the findings of the learned High Court judge. It is therefore appropriate for this court to exercise its powers of appellate intervention and reverse the findings and the decision of the High Court. In the circumstances of this case, it is our considered view that the plaintiff had not proved its case on balance of probabilities against the defendants.

[56] For the reasons above stated we would allow this appeal with costs. The question of law posed is answered in the negative. The orders of the High Court as affirmed by the Court of Appeal are hereby set aside. As regards the counterclaim of the defendants against the plaintiff, we would allow the counterclaim with costs to the extent of only the recovery of the sum of RM20,833,053 already paid to the plaintiff by the defendants under the contract sum for phase 1 of the project with interest at the rate of 8%pa, so as to put the parties back to their original positions. The deposit is to be refunded to the defendants.

Appeal allowed with costs.

Reported by Ashok Kumar